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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 523.

CENTRAL TRANSFER COMPANY,
Petitioner,

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS et al.,
Respondents.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

### STATEMENT.

In view of omissions and inaccuracies appearing in the statement of petitioner, respondents submit the following:

This controversy has to do with the methods employed by carriers by railroad serving St. Louis, Missouri, and East St. Louis, Illinois, sometimes referred to as the St. Louis-East St. Louis switching district, in connection with the receipt, delivery and interchange of less-than-carload freight.

Notwithstanding the various bridges, traffic has been handled by dray or truck between St. Louis and East St. Louis since 1854 (R. 83). Two methods of receiving and delivering less-than-carload freight have been and are employed, viz., through off-track stations designated by the carriers in tariffs filed with the Interstate Commerce Commission, hereinafter referred to as the Commission, and maintained and operated by transfer companies and by the so-called direct delivery plan under which traffic passes through a constructive station on its journey to and from the trader's place of business, from and to the on-track stations in East St. Louis.

During the early period of the transfer of less-than-carload freight between St. Louis and East St. Louis the charges for such transriver service were added to the rail rates to and from East St. Louis. Through various steps the rates of the carriers were extended to St. Louis and such transriver service from that time on was made by the carriers and the charges therefor included in their line-haul rates (R. 84).

When this practice was established off-track stations became stations designated in the tariffs where freight would be received and delivered in the same manner as though they were located on the tracks of the carriers.

The contract assailed in the bill of complaint (R. 49) to which we shall hereinafter refer, in so far as this proceeding is concerned, has to do with the handling of less-than-carload freight between on-track stations of the car-

riers and between off-track and on-track stations of such carriers, although petitioner disclaims any concern or interest in traffic moving between on-track stations (R. 71).

The less-than-carload traffic moving between on-track stations of the carriers is what is known as interchange traffic and may be described generally as traffic moving to East St. Louis over the line of a carrier terminating at that point and transported by dray or truck ~~from~~ to the on-track station of a carrier whose lines extend westerly from St. Louis.

As to less-than-carload traffic moving between off-track and on-track stations of the carriers the following is illustrative: The rails of important lines, such as the Baltimore and Ohio, end in East St. Louis, but by their tariffs these carriers provide rates to and from St. Louis on the same basis as applicable to and from East St. Louis. They, therefore, hold themselves out to deliver at and ship from St. Louis, and, not having their own rails to St. Louis, employ other means of performing the service between the ends of their rails and St. Louis. Such means consist of off-track stations established at points in St. Louis between which and their rails or on-track stations in St. Louis less-than-carload traffic is hauled by dray or truck and at the expense of such carriers.

The carriers, for several years prior to May, 1927, had been considering the method in which less-than-carload freight was being handled in the St. Louis-East St. Louis switching district looking towards a discontinuance by such

carriers of allowances to numerous transfer companies and contracting for the service in question with only one transfer company (R. 43).

Especially were such carriers concerned regarding what they considered waste and abuses that had grown up during the years in connection with the handling by drays or trucks of less-than-carload freight between off-track and on-track stations in such district, including the increased number of such off-track stations. In the opinion of some of the carriers the situation as far back as March, 1923, was admittedly bad and was resulting in unnecessary costs to the railroads of thousands of dollars annually. As far back as the date last mentioned transfer companies other than those then employed were in the field clamoring for recognition, and it was the thought of some of the carriers that the desired results could be obtained by confining the traffic to one trucking company (R. 43).

Another abuse was the performance of the transfer companies employing soliciting forces to compete with each other to see which one of them would do the hauling for the carriers. The expense of such method was applied to operations and ultimately borne by the carriers who employed the transfer companies as their agents. In some cases where off-track stations were located across the street from on-track stations of the carriers the haul performed by the trucking company would be only across the street from the off-track station to the on-track station (R. 73, 74).

In the opinion of the carriers the elimination of such duplication would have the effect of bringing about savings to such carriers (R. 74).

Also, one purpose of the carriers in arriving at the one-transfer plan was to determine for themselves where a given off-track station should be located and how it should be operated (R. 73).

In response to numerous petitions filed with the Interstate Commerce Commission by certain teaming associations, transfer companies and others, the Commission, on May 2, 1927, ordered a general investigation concerning the lawfulness and methods then in effect at St. Louis and East St. Louis having to do with the receipt and delivery by dray or truck of less-than-carload freight at those points.

During May, 1927, the carriers, through their joint publishing agent, filed with the Commission their tariff effective July 1, 1927, whereby it was proposed to reduce the number of off-track stations then in existence at St. Louis from twelve to seven, and to reduce such stations at East St. Louis from two to one (R. 49, 93).

The tariff referred to was suspended by the Commission for the statutory period (seven months) and the Commission entered upon an investigation as to the lawfulness of such tariff.

The issues involved in the general investigation ordered by the Commission heretofore referred to and the issues involved in the investigation of the schedules heretofore

mentioned were consolidated and, commencing on November 1, 1927, a lengthy hearing was held concerning the practices of the carriers by railroad in connection with the receipt and delivery of less-than-carload freight at St. Louis and East St. Louis and concerning the lawfulness of the schedules contained in the tariff in question.

Following such investigation and hearing incident thereto, a report was handed down by the Commission dated May 13, 1929 (R. 80). In such report the Commission found:

1. That the proposal of the carriers, other than the Chicago and Alton, to employ a single transfer company for the operation of off-track stations and the hauling between such stations and the on-track stations of the railroads, and in the interchange of freight between railroads, is not violative of any provision of the Interstate Commerce Act.

2. That the proposal of the carriers, other than the Alton, to reduce the number of off-track stations in St. Louis from twelve to seven and at East St. Louis from three to two will not be harmful to the public interest or result in unreasonable and inadequate service.

The Commission, however, declined to approve the allowances proposed to be paid for such service on the ground that such allowances were not based upon a cost study, and required the carriers to make a cost study and submit the results thereof to the Commission.

A further hearing was held, and following such further hearing the Commission, on July 27, 1931, handed down its second report and order (R. 143).

In such second report and order the Commission found (R. 150) that, based upon 830,514 tons, which the carriers stated was the total off-track and interchange service for a normal year, the reduced rates provided in the new contract would result in the saving of $181,398.37 annually. It further found that it was estimated that the discontinuance of the use of off-track stations by the St. Louis-San Francisco and Missouri Pacific and the partial discontinuance of the use of such stations by the other west-side lines, as provided in the new contract, would effect an annual saving of $125,000, or a total saving of $306,398.37.

The allowances, therefore, to be made by the carriers for the services to be performed were approved by the Commission.

On June 1, 1931, the carriers and the Columbia Terminals Company entered into the contract assailed in the bill of complaint (R. 49).

Less-than-carload traffic covered by such contract, in so far as at present material, may be described as follows:

> "(a) Between 'on-track' freight stations of the railroads in St. Louis, Missouri, and the said 'off-track' freight stations in East St. Louis, Illinois.
>
> "(b) Between 'on-track' freight stations of the rail-

roads in East St. Louis, Illinois, and the said 'off-track' freight stations in St. Louis, Missouri.

"(c) From the said 'off-track' freight stations of the railroads in St. Louis, Missouri, to the 'on-track' freight stations in St. Louis, Missouri.

"(d) Between 'on-track' freight stations of the railroads located in St. Louis, Missouri (interchange service).

"(e) Between 'on-track' freight stations of the railroads located in East St. Louis, Illinois (interchange service).

"(f) Between 'on-track' freight stations in St. Louis, Missouri, and 'on-track' freight stations in East St. Louis, Illinois (interchange service)."

The effect of the contract was to confine the handling of less-than-carload traffic between on-track stations and between the off-track and on-track stations of the carriers within the St. Louis-East St. Louis switching district to one transfer company, the Columbia Terminals Company. The contract also reduced the number of off-track stations at St. Louis from twelve to seven, and East St. Louis from two to one. Also, the carriers agreed to file the necessary tariff schedules with the Interstate Commerce Commission and appropriate state commissions.

It should also be stated that by letter dated April 21, 1931, the Central Transfer Company, petitioner herein, through its vice-president and general manager, submitted to the president of the Terminal Railroad Asso-

ciation of St. Louis its bid, asking to be permitted to contract as the sole transfer agent of the carriers for the transportation of less-than-carload freight now being handled by the Columbia Terminals Company through the contract heretofore referred to (R. 76).

On the 21st day of August, 1931, petitioner filed its bill of complaint in the United States District Court at St. Louis, Missouri, alleging a violation of Sections 1 and 2 of the Sherman Act, and praying temporary and permanent injunctive relief under Sec. 26, Title 15, U. S. C. A. (R. 2-10).

When petitioner's bill was filed the two regular Judges were out of the district and the case was especially assigned to Judge Merrill E. Otis.

On page 2 of the petition for writ of certiorari it is stated that a preliminary injunction was granted by Judge Merrill E. Otis, sitting specially, with bond fixed in the sum of $15,000.00. This statement is incorrect. A temporary restraining order only was issued at Kansas City, Missouri (R. 16, 17, 18), and such temporary restraining order was issued for the purpose only of maintaining the status quo until the plaintiff "shall have had an opportunity to present to one of the Judges of the United States District Court for the Eastern District of Missouri its application for a temporary injunction" (R. 18).

On September 21, 1931, the cause came on to be heard on motion for preliminary injunction, and, upon stipulation of the parties, was tried on its merits before Judge

Charles B. Davis at St. Louis, argued orally and submitted on briefs, and findings of fact and conclusions of law proposed by the parties thereto.

On October 19, 1931 (R. 38), the District Court handed down its findings of fact and conclusions of law, denied plaintiff the relief prayed for, and entered its final decree dismissing plaintiff's bill. Thereafter the tariffs in question went into effect.

The District Court held:

1. That the matter involved is subject to the regulation and supervision of the Interstate Commerce Commission, and that petitioner is not entitled to the injunctive relief sought.

2. That the contract assailed in the bill of complaint was not in violation of the antitrust laws of the United States.

On appeal to the Circuit Court of Appeals, Eighth Circuit, the decree of the District Court was affirmed (R. 178).

## SUMMARY OF THE ARGUMENT.

I.

The Clayton Act confers upon any person, firm, corporation or association the right to sue for and have injunctive relief against threatened loss or damage by a violation of the Antitrust Laws, with the proviso that "nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of Chapter 1 of Title 49, Transportation, in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

Clayton Act (U. S. C. A., Title 15, Sec. 26).

II.

The Interstate Commerce Commission has authority to inquire into the management of the business of all common carriers subject to the provisions of the Interstate Commerce Act, is in terms required to execute and enforce the provisions of such act, and the investigating and supervising powers of such Commission extend to all of the activities of carriers subject to the Interstate Commerce Act and to all sums expended by them which could affect in any

way their benefit or burden as agents of the public. Such powers must necessarily be expressed in generalities.

Interstate Commerce Act, Section 12 (1) (U. S. C. A., Title 49, Sec. 12);
Smith v. Interstate Commerce Commission, 245 U. S. 33.

III.

Transportation is defined to include locomotives, cars, vehicles, vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, expressed or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, storage and handling of property transported. This includes such service as would be performed by trucking companies as employes of the carriers in handling less-than-carload freight in terminal service.

Interstate Commerce Act, Section 1 (3) (U. S. C. A., Title 49, Sec. 1);
In the Matter of Legality of Tariffs Embracing Motor Trucks, etc., 91 I. C. C. Rep. 539.

IV.

The service between on-track stations of the carriers performed by trucks as employes of such carriers constitutes interchange service and is within the control and supervision of the Interstate Commerce Commission.

Interstate Commerce Act, Section 3 (3) (U. S. C. A., Title 49, Sec. 3);
Pennsylvania v. United States, 236 U. S. 351.

V.

Carriers by railroad are required to file with the Commission schedules showing the application of their line-haul rates, to what points such rates apply, and showing the services the carriers undertake to perform under their published rates, by the following provisions of the Interstate Commerce Act:

Interstate Commerce Act, Section 1 (6) (U. S. C. A., Title 49, Sec. 1);
Interstate Commerce Act, Section 1 (12) (U. S. C. A., Title 49, Sec. 1);
Interstate Commerce Act, Section 1 (13) (U. S. C. A., Title 49, Sec. 1);
Interstate Commerce Act, Section 6 (1) (U. S. C. A., Title 49, Sec. 6);
Interstate Commerce Act, Section 15 (7) (U. S. C. A., Title 49, Sec. 15).

VI.

Petitioner seeks an injunction to prevent the carriers from applying rates duly filed with the Commission, since the only method by which the carriers can establish or eliminate an off-track station is through the filing with such Commission of tariffs designating off-track stations from and to which their rates will apply.

In so far as the movement of less-than-carload freight is concerned between off-track and on-track stations of the

carriers, the matter in controversy concerns only rates filed with the Commission, which question is committed to the jurisdiction of the Commission.

Texas and Pacific Rwy. Co. v. Abilene Cotton Oil Co., 204 U. S. 426;
Baltimore & Ohio R. R. v. Pitcairn Coal Co., 215 U. S. 482;
Transfer of Freight Within St. Louis, etc., 155 I. C. C. Rep. 129;
Trucking Less-Than-Carload Freight, etc., 185 I. C. C. Rep. 71;
Co-ordination of Motor Transportation, 182 I. C. C. Rep., l. c. 367;
Discontinuance of Off-Track Stations in New York City, 173 I. C. C. Rep. 727, 730;
Northern Pacific Rwy. Co. v. Solum, 247 U. S. 477;
Procter and Gamble v. U. S., 225 U. S. 282;
Motor Bus and Motor Truck Operation, 140 I. C. C. Rep., l. c. 729.

VII.

The contemporaneous construction of a statute by those charged with execution and application, especially when it has long prevailed, while not controlling, is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous.

United States v. Finell, 185 U. S. 235;
New York etc. R. Co. v. Interstate Commerce Commission, 200 U. S. 361;
California v. Deseret Water Co., 243 U. S. 415.

VIII.

The matter in controversy being subject therefore to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission, petitioner is not entitled to bring an action in equity for injunctive relief against respondents, common carriers by railroad subject to the provisions of the Interstate Commerce Act, because of an alleged violation of the Antitrust Laws of the United States.

Midland Valley R. R. v. Barkley, 276 U. S. 483;
General Investment Company v. New York Central R. R. Co., 271 U. S. 228;
Keogh v. C. & N. W. Ry. Co., 260 U. S. 156;
Wheeling & L. E. Rwy. Co. v. Pittsburgh & W. Va. Rwy. Co., 33 Fed. (2d) 390, 280 U. S. 593;
U. S. Nav. Co. v. Cunard S. S. Co., 50 Fed. (2d) 83, 7 U. S. Sup. Ct. Adv. Op. 300;
Morrisdale Coal Company v. Pennsylvania R. R. Co., 230 U. S. 304;
General Investment Company v. New York Central R. R. Co., 23 Fed. (2d) 822.

IX.

The action of respondents in entering into and carrying out the contract assailed in the bill of complaint whereby one transfer company handles less-than-carload freight for the carriers between off-track and on-track stations and between on-track stations of such carriers in terminal

service, does not violate Sections 1 and 2 of the Sherman Antitrust Act, or either of them.

Skaggs et al. v. Kansas City Terminal Railway Co. et al., 233 Fed. 827;

Donovan v. Pennsylvania Company, 199 & S. 280;

Missouri Pacific R. R. Co. v. Reynolds-Davis Grocery Co., 268 U. S. 366;

Terminal Warehouse Company of Baltimore City v. United States et al., 31 Fed. (2d) 951;

Express Cases, 117 U. S. 1;

St. Louis Drayage Company v. Louisville & Nashville R. R., 65 Fed. 39;

Atchison, T. & S. F. R. R. Co. v. Denver & N. O. R. Co., 110 U. S. 680;

B. & W. Taxi Co. v. B. & Y. Taxi Co., 276 U. S. 518;

Chicago etc. R. R. Co. v. Pullman Car Co., 139 U. S. 79;

Little Rock & M. R. Co. v. St. L. I. M. & S. Ry. Co., 41 Fed. 559;

Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. Co., 51 Fed. 465;

U. S. v. Terminal R. R. Association, 224 U. S. 383;

Terminal Railroad Association v. United States, 236 U. S. 194;

United States v. Joint Traffic Association, 171 U. S. 505;

Phillips v. Iola Portland Cement Co., 125 Fed. 593;

Merchants Warehouse Company v. United States, 44 Fed. (2d) 379, 283 U. S., l. c. 506;

United States v. B. & O. R. R. Co., 231 U. S. 274.

X.

The petitioner is not entitled to have the case transferred to the law side of the court, and the Court of Appeals, in not determining that the evidence shows a case for the law side of the court, committed no error.

Twist et al. v. Prairie Oil & Gas Company, 274 U. S. 684;
Liberty Oil Company v. Condon National Bank et al., 260 U. S. 235;
Perego v. Dodge, 163 U. S. 160;
Palmer v. Doull-Miller Company, 233 Fed. 309;
Shapiro v. Lyle, 30 Fed. (2d) 971;
Keogh v. C. & N. W. Ry. Co., 260 U. S. 156.

## ARGUMENT.

### I.

### Petitioner's Right to Sue.

The Court of Appeals held (R. 177) that the suit brought by petitioner is in respect of a matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission, and that the court below was correct in holding that petitioner had not the right to bring it. At page 9 petitioner says that the Court of Appeals declined to discuss the merits. While it is true the Court said there was no occasion for discussing the question whether the agreement violated the antitrust laws, nevertheless, the decision that petitioner has not the legal capacity to maintain the action is a decision on the merits.

> General Investment Company v. New York Central R. R. Co., 271 U. S. 228.

The Interstate Commerce Act, Section 6 (1) (U. S. C. A., Title 49, Sec. 6), provides, in substance, that every common carrier subject to the provisions of the Interstate Commerce Act shall file with the Commission created by the act and print and keep open to public inspection schedules showing all rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, etc. The tariffs in question were filed in conformity with the provisions of that section.

Off-track stations of the carriers can be made available only through the medium of tariffs filed with the Commission and permitted to become effective by that body. What petitioner is attempting to do is to enjoin the carriers, not from carrying out the contract assailed in the bill of complaint, but from carrying out the provisions of tariffs filed and required to be filed with the Commission.

Petitioner seeks to separate the controversy into two parts: One a matter of contract and the other a matter of tariffs. Without in terms assailing such schedules in its bill, petitioner attempts to enjoin the respondents in respect of the contract. Since the places of business of petitioner are not designated in such tariffs as off-track stations the question naturally arises: If respondents are enjoined from carrying out the provisions of the contract attacked, what becomes of the tariffs on file with the Commission?

When this action was instituted there were on file with the Commission the tariffs of the carriers designating only the places of business of the Columbia Terminals Company as off-track stations of such carriers and canceling previous tariffs designating the places of business of the petitioner as off-track stations. Had the court below entered a decree granting the injunctive relief sought, how would that have availed petitioner? To have granted petitioner any measure of relief, would not the Court necessarily have been required to by its decree not only compel respondents to file tariffs then on file with

the Commission and approved by that body, but also restore the places of business of petitioner as off-track stations through the filing of additional schedules with the Commission?

Petitioner concedes that the services performed by the carriers in furnishing off-track stations and in transferring less-than-carload freight from on-track to off-track stations are matters over which the Interstate Commerce Commission has jurisdiction (R. 172).

In its reply brief in the Court of Appeals the petitioner states:

> "We have always conceded that the Interstate Commerce Commission has jurisdiction of the services performed by these transfer companies, and that the Commission may investigate the service to determine whether the carrier appellees have violated any of the provisions of the Interstate Commerce Act. There is no doubt about this jurisdiction of the Commission, but, as the Commission has correctly held, it has no jurisdiction to control the carriers' discretion in selecting their agents who perform the service."

The Court of Appeals correctly describes petitioner's theory of the case in the following language (R. 172):

> "It is the plaintiff's theory that, while the services to be performed under the contract, the cost of which is necessarily reflected in the rates contained in the tariffs filed with the Commission, are matters subject

to the jurisdiction of the Commission, the agreement itself providing for such services and fixing compensation therefor is not such a matter, and therefore that a suit brought for injunctive relief against the performance of the agreement is not in respect to any matter within the jurisdiction of the Commission. It is asserted that the Court may prevent the carrying out of the contract without affecting the services to be performed or the rates to be charged for such services. To separate the matter of the services required to be performed for the carriers by the Columbia from the agreement by which the railroads have contracted for their performance, and to enjoin the carrying out of the contract without affecting the services or the rates, would seem to require one of those delicate major operations which, while successful from a surgical standpoint, necessarily kills the patient. Under the plaintiff's theory, the Court can enjoin the carriers from establishing off-track stations at the places of business of the Columbia, as provided by the contract, but leave the tariffs designating such stations undisturbed; it may enjoin the carriers from employing the Columbia as their sole transfer agent, and yet leave undisturbed the services which the Columbia is to perform for the carriers at a stipulated cost, as well as the tariff rates which reflect the cost of such services."

The Court of Appeals further finds, and correctly (R. 173):

"Unquestionably, as the plaintiff concedes, the Interstate Commerce Commission had jurisdiction to

investigate, as it did, the reasonableness and lawfulness of what the carriers proposed to do, namely, to reduce the number of off-track stations and to employ a single transfer company to maintain for them such stations and to receive and deliver less-than-carload freight from and to their off-track stations."

In connection with the contention of respondents that the matter here involved is within the supervision and control of the Commission, attention should be called to the various provisions of the Interstate Commerce Act, which, in our opinion, conclusively establish the fact that this controversy, being one of rates and transportation under such rates, is for the Commission. In Interstate Commerce Act, Section 1 (3) (U. S. C. A., Title 49, Sec. 1), transportation is defined to include locomotives, cars, vehicles, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, expressed or implied, for the use thereof, and all services in connection with receipt, delivery and storage and handling of property transported. This includes such services as would be performed for the carriers by the transfer company under the contract assailed in the bill of complaint.

By Interstate Commerce Act, Section 1 (11) (U. S. C. A., Title 49, Sec. 1), it is made the duty of every carrier by railroad subject to the Act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect thereto.

It is obvious that, in view of the prior definition of "transportation," the term "car service" is broad enough to include the service performed for respondents by the transfer company, and it also follows that the Commission may condemn as unlawful and require to be canceled any tariff provisions which prevent or threaten the performance of the carriers' duties under said paragraphs (3) and (11) of section 1 of the act.

This Court held, in Pennsylvania Co. v. United States, 236 U. S. 351, in considering the jurisdiction of the Commission, that:

> "Not only does the act define railroads, but it specifically defines what is meant by transportation, which is made to include 'cars and other vehicles, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract, expressed or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.' "

The handling of traffic by the carriers between on-track and off-track stations was necessarily a part of the services to be performed under the schedules filed with the Commission, and how that service was to be performed was necessarily an essential part of any investigation that might thereafter be conducted by the Commission.

In the case of Midland Valley R. R. v. Barkley, 276 U. S.

483, the Supreme Court, in discussing the failure to furnish cars for interstate movement of coal during car shortage, held that the question involved was administrative and committed to the exclusive jurisdiction of the Interstate Commerce Commission.

In that case Justice Brandeis said:

> "The assertion that no administrative question is here involved rests upon a misapprehension. It may be assumed that there was no order of the Commission which required the Midland to distribute all available open top cars among the tipple mines, but the reasonableness of the Midland's practice in doing so and in allotting box cars to the wagon mines was the substantial matter in controversy. * * * The reasonableness of the rule adopted by the carrier is a matter for the Commission."

The Interstate Commerce Act, Section 1 (6) (U. S. C. A., Title 49, Sec. 1), directs the carriers to establish rates, regulations, practices and facilities for the handling, transporting, storing and delivery of property, and it is clearly within the jurisdiction of the Commission in its administrative capacity for that body to determine when the carriers have complied with the provisions of such section. The service here involved is a terminal and delivery service and the use of a transfer company to affect such terminal and delivery service is essentially the use of a facility. It is the contention of petitioner that the con-

tract in controversy under which the carriers employ one transfer company to transport less-than-carload freight between the off-track and on-track stations, specified in the schedules on file with the Commission, is an instrument over which the Commission does not have jurisdiction.

The error into which petitioner fell is obvious. Under the Clayton Act it is the subject matter covered by the contract that must be within the jurisdiction of the Commission. If such subject matter is committed by the Interstate Commerce Act to the supervision, administration or other jurisdiction of the Commission, then the presence or nonpresence of a contract as incidental thereto does not affect the regulatory powers of the Commission. Two or more carriers might agree to maintain a certain rate between two given points and file tariffs with the Commission carrying out such agreement, and in such a case unquestionably the lawfulness of that rate would be for the Commission to determine, notwithstanding the fact that such rate was brought about by an agreement which violated the Antitrust Laws of the United States.

The contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous. The Interstate Commerce Commission has had occasion to determine its jurisdiction in connection with the matters involved in this controversy.

It is the contention of respondents that the transfer company is merely an agent and facility of the respondents, transports no freight for its own account in so far as this controversy is concerned, but is only employed by the rail carriers in interstate commerce. This contention is fully borne out by the decision of the Supreme Court in Missouri Pacific R. R. Co. v. Reynolds-Davis Grocery Co., 268 U. S. 366, which holds that those performing only terminal services are merely the agents of the line haul carriers, that their charges are in the nature of switching charges and are absorbed by the line haul carriers.

In the case of In the Matter of Legality of Tariffs Embracing Motor Trucks, etc., 91 I. C. C. 539, the Commission said:

> "In discussing the legality of the tariffs under investigation, the extent of our jurisdiction over the different kinds of service by motor truck or wagon transfer hereinbefore described should first be determined."

After a discussion of the proposition and after reference to certain applicable provisions of the Interstate Commerce Act, the Commission concludes:

> "While motor truck or wagon transfer companies are not common carriers subject to the act, truck or wagon transfer services performed in connection with terminal services of a common carrier subject to the act, or with transfer of freight in transit at an inter-

mediate point by such common carriers, are subject to our jurisdiction. Such service is a part of a transportation service by a carrier over which we have jurisdiction."

The Commission again had occasion to consider the same question in Discontinuance of Inland or Off-Track Stations in New York City, 173 I. C. C. 727, and arrived at the conclusion that the services such as here involved were squarely within its jurisdiction.

The Commission also passed upon the question of its jurisdiction over terminal trucking service performed by railroads in Motor Bus and Motor Truck Operation, 140 I. C. C. Rep., l. c. 729, where it said:

> "We have held that motor carriers are not common carriers subject to the act, but that when services are performed by motor carriers in connection with terminal services of a common carrier subject to the act, or with the transfer of commerce in transit at an intermediate point by such common carrier such motor service is part of the transportion service by a carrier over which we have jurisdiction and such motor-carrier service is under our jurisdiction. Carriers subject to the act may publish tariffs covering charges for such terminal services by motor carriers the same as charges for any other service granted by them as part of their transportation service (Tariffs Embracing Motor-Truck or Wagon Transfer Service, 91 I. C. C. 539)."

To the same effect is the case of Trucking Less-Than-Carload Freight, etc., 185 I. C. C. 71. In that case the Commission, commencing at page 72, says:

> "We have held that motor-truck or wagon-transfer companies are not carriers subject to the act; that line-haul service performed by them is not transportation subject to the act, but that motor-truck or wagon-transfer service performed in connection with terminal services by a rail carrier is subject to our jurisdiction (Tariffs Embracing Motor-Truck or Wagon Transfer Service, 91 I. C. C. 539). When a motor-truck service between freight houses within the same terminal district is performed in interstate commerce by a carrier subject to our jurisdiction, the extent of the service and the rates therefor must be published in tariffs filed with us."

To the same effect is Co-ordination of Motor Transportation, 182 I. C. C. Rep., l. c. 367. Throughout its petition petitioner directs attention to the fact that the Commission has held that motor-truck or wagon-transfer companies are not carriers subject to the Interstate Commerce Act. The cases just cited deal with the question fully and hold that the terminal services performed by such instrumentalities for carriers subject to the act are likewise subject to the Interstate Commerce Act.

Without regard to the contract assailed in petitioner's bill, since the subject matter of this controversy is within the supervision and regulation of the Commission, plaintiff is not entitled to maintain this suit.

A case much in point is that of Keogh v. C. & N. W. Ry. Co., 260 U. S. 156. That case was an action under paragraph 7 of the Antitrust Act of July 2, 1890, brought by Keogh in the Federal District Court for Northern Illinois, Eastern Division. The cause of action set forth was that Keogh was a manufacturer of flax tow, and that the corporations, defendants, were interstate carriers, and that such carriers had formed an association known as the Western Trunk Line Committee; that it was the function of that committee to secure an agreement in respect to freight rates among railroad companies which would otherwise be competing carriers, and that by means of such agreement competition was eliminated. Uniform rates were established and interstate commerce restrained.

The defendants set up the fact that every rate complained of had been duly filed by the several carriers with the Interstate Commerce Commission; that upon such filing the rates had been suspended for investigation upon complaint of Keogh, and that thereafter the rates were approved by the Commission and made effective.

In disposing of the Keogh Case the Court said, in part:

> "The instrument by which Keogh is alleged to have been damaged is rates approved by the Commission. It is, however, conceivable that, but for the action of the Western Trunk Line Committee, one or more of these railroads would have maintained lower rates. Rates somewhat lower might also have been reasonable. Moreover, railroads had often, in the fierce

struggle for business, established unremunerative rates."

Thereafter the Court further states:

"But under the Antitrust Act a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal, and if so, the Government may have redress by criminal proceedings under section 3, by injunction under section 4, and by forfeiture under section 6. That was settled by United States v. Trans-Missouri Freight Association, 166 U. S. 290, and United States v. Joint Traffic Association, 171 U. S. 505. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government. It does not, however, follow that Keogh, a private shipper, may recover damages under section 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. There are several reasons why he cannot."

The case of Wheeling & L. E. Ry. Co. v. Pittsburgh & West Virginia Ry Co., 33 Fed. (2d) 390, is also an authority for the contention that there is no room for injunctive relief under the Clayton Act, if the matters complained of are subject to the regulation and supervision of the Interstate Commerce Commission.

Certiorari to review this decision was denied by the Supreme Court in P. & W. Ry. Co. v. W. & L. E., 280 U. S. 593.

Petitioner contends at pages 22 and 23 that the Colum-

bia Terminals Company is a necessary party and that that situation deprives respondents of the defense that the subject of the action is within the jurisdiction of the Commission.

The point is overlooked that if the matter in question is subject to the regulation and supervision of the Commission, the authority to bring a suit because of the violation of the Antitrust Laws is with the United States, and the question of who is a necessary defendant is immaterial. The point involved here is not who may be made defendants, but who may be made a plaintiff.

Petitioner cites the case of Moore v. New York Cotton Exchange et al., 270 U. S. 593, as authority in support of its right as a private litigant to maintain this suit against respondents for injunctive relief and refers to the fact that the Western Union Telegraph Company was one of the defendants in that case and that it is a common carrier, subject to the provisions of Chapter 1 of Title 49, U. S. C. A., Transportation, and to the fact that the District Court, the Circuit Court of Appeals, and this Court assumed full jurisdiction of that case and decided all questions presented therein on the assumption that the plaintiff had a right to bring the suit under Section 26, Title 15, U. S. C. A., notwithstanding the proviso contained therein.

Petitioner discusses this case at some length and evidently relies upon it as an authority in its favor to maintain this suit.

Petitioner says that whether jurisdiction was assumed because of the joinder of an indispensable party, the Cotton Exchange, which is not subject to the Interstate Commerce Act, or because the subject matter of the bill was not in respect of any matter over which the Interstate Commerce Commission has jurisdiction, does not appear from the opinion in the case. That case is not even remotely analogous to the case at bar. The Moore case involved a controversy between the Odd-Lot Cotton Exchange and the New York Cotton Exchange and the Western Union Telegraph Company and a subsidiary of the Telegraph Company over the distribution of quotations of cotton prices. The Odd-Lot Cotton Exchange made application to the two telegraph companies for this service which was refused, the New York Cotton Exchange having declined to give its consent upon the ground that the Odd-Lot Exchange was conducting a bucket shop. Plaintiff then sought a mandatory injunction requiring the New York Cotton Exchange to furnish it with continuous quotations. Federal jurisdiction was invoked under the antitrust laws of the United States. This Court said, at pages 603 and 604:

> "First. We are of opinion that upon the allegations of the bill no case is made under the Federal Antitrust Laws. The only possible ground on which the suit can be maintained rests in the claim that there is a violation of Sections 1 and 2 of the Sherman Antitrust Act, c. 647, 26 Stat. 209, for which appellant

is entitled to sue under Section 16 of the Clayton Act, c. 323, 38 Stat. 737. And whether this claim is tenable turns alone upon the effect of the contract between the New York Exchange and the Western Union. Independent of that contract, there is no averment of fact in the bill upon which a violation of the Antitrust Act can be predicated. The New York Exchange is engaged in a local business. Transactions between its members are purely local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York and be deliverable from such warehouse. Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another. If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce."

Since interstate commerce was not involved, how could the Interstate Commerce Commission have any jurisdiction in the premises? That Commission had no jurisdiction over any of the matters involved in that suit, whereas in the suit at bar the Commission has complete regulatory supervision.

The opinion of the Court of Appeals in the Moore case

emphasizes the fact that interstate commerce was not involved. In 296 Fed. 61 it is said, at pages 70 and 71:

> "(8) The complainant asks a mandatory injunction compelling the defendants to furnish to it the continuous quotations of prices of contracts for the future delivery of cotton made on the New York Cotton Exchange. The transactions in which the latter exchange is engaged and in which the complainant itself is engaged constitute, it is claimed, interstate commerce. The bill alleges that the purchases and sales made on the exchange 'constitute a large and important part of the interstate commerce as between said cotton-growing states and other states, including the State of New York. That in addition to the said interstate sales and purchase as alleged for delivery from said states, through and into many states of the United States, and into the State of New York, the said interstate commerce involves the interstate shipments and transportation of said commodity, through and from said cotton-growing states to the State of New York, whence it is consigned and shipped to other cotton markets of the United States and foreign countries for manufacture.' The contracts made on the New York Cotton Exchange are made in the board room of the exchange in the city of New York, and they provide that the cotton is deliverable from licensed warehouses in the Port of New York. Performance of the contract is made by the delivery of negotiable warehouse receipts issued by licensed warehouses in New York. There is no obligation to make delivery at any place except in the Port of New York. Such a transaction is local in its character and does not involve interstate commerce. The decisions of the

Supreme Court make this clear. In Hopkins v. United States, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, it was held that the Kansas City Live Stock Exchange was not engaged in interstate commerce under the following circumstances: It received consignments of cattle from owners in other states upon an understanding that they should be sold and the net amount realized on the sale returned to the owners. In its opinion the Court said:

> "'* * * It is immaterial over how many states the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only, performed.
>
> "'The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another state, are articles of interstate commerce, yet it does not

> therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade.'

"There are other decisions of that Court which assert a like doctrine. (See Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; Ware & Leland v. Mobile County, 209 U. S. 405, 413, 28 Sup. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031; Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. Ed. 822.)

"The complainant relies upon Board of Trade of the City of Chicago v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470, 67 L. Ed. 839. That case involved an appeal from a decree which dismissed a bill in equity brought by the Board of Trade to enjoin certain United States officials from taking steps to enforce the Act of Congress of September 21, 1922, known as the Grain Futures Act, the constitutionality of which act was directly involved. That case is not distinguishable in principle from that of Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229, which involved the constitutionality of the Packers' and Stockyards' Act of 1921 (Comp. St. Ann. Supp. 1923, Sections 8716¼-8716¼z). In neither case has the Court overruled the cases heretofore cited in this opinion in which sales on the exchange were regarded as transactions in intrastate commerce and not in interstate commerce. It sustained the right of Congress to regulate in the one case the boards of trade and in the other the various stockyards of the country

as great national public utilities. The acts involved assumed that the corporations regulated by the acts conducted a business affected by a public use of a national character and that they were therefore subject to national regulation. These cases show that the power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. We find another illustration of the principle in the Transportation Act of 1920, which authorizes supervision by the Interstate Commerce Commission of intrastate commerce where it is so carried on as to favor persons or localities in intrastate commerce as against those in interstate commerce. (See Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086; The Minnesota Rate Cases, 230 U. S. 352, 399, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. [n. s.] 1151, Ann. Cas. 1916 A 18.)

"But we find nothing in Stafford v. Wallace, supra, or in Chicago Board of Trade v. Olsen, or in any decision of the Supreme Court, which supports the complainant's contention that the New York Cotton Exchange is engaged in interstate commerce. Neither are we cited to any act of Congress which entitles the complainant to maintain its bill. And we conclude that the bill itself must be dismissed."

The case of General Investment Co. v. New York Cent. R. Co., 23 Fed. (2nd) 822, holds that:

"Whenever any subject matter pertaining to inter-

state commerce is vested in the Interstate Commerce Commission the proviso of Section 16 applies to it."

Certiorari was denied in this case by the Supreme Court (277 U. S. 588).

II.

**Illegal Combination.**

It was the conclusion of the Court of Appeals that the suit brought by petitioner is in respect of a matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission, and that the court below was correct in holding that petitioner had not the right to bring it.

In view of that conclusion the Court of Appeals found no occasion for discussing the question as to whether the agreement between the carriers and the Columbia is violative of the antitrust laws, since that question could properly be considered only in a suit in which injunctive relief was sought by the United States.

The petitioner asserts that in so holding the Court erred, that petitioner had a lawful right to bring the suit, and that the Court should have held that the Anti-Trust Act was violated.

Petitioner in its bill (R. 8) alleges, among other things:

"That on or about March 31, 1931, with the deliberate purpose and intent of consummating and carrying

into binding effect the aforesaid unlawful conspiracy and agreement to destroy the business of your orator and to unlawfully restrain petitioner in said business the railroads entered into a mutual and reciprocal agreement among themselves, designating and appointing the Terminal Railroad Association of St. Louis as their common agent," etc.

To refute the assertion that the purpose of the one-transfer plan is to destroy the business of petitioner and others similarly situated it is only necessary to refer to the testimony and the contract entered into between the rail carriers and the Columbia Terminal Company. The testimony unquestionably shows the purpose and only purpose of the one-transfer plan (R. 73). Some of that testimony is as follows:

"One purpose of the carriers in arriving at the one-transfer plan is to determine for themselves where the off-track station should be located, and who should operate it. That is evidenced by the fact that, in designating the seven off-track stations in St. Louis, to and from which the St. Louis rates of the carriers apply, as outlined in the tariff to be effective November 1, 1931, the carriers not only eliminated certain stations of the Central Transfer Company, but they also failed to recognize two of the existing stations of the Columbia Terminals Company. Under the present method, and before the filing of these tariffs, the greatest abuse came about from the fact of locating what might be called competitive stations—that is hardly a proper designation—duplicate stations in the

same general locality, which, of course, if all the transfer companies engaged as agents of the carriers were supported, would necessitate unnecessary support of, and investment in, facilities and equipment. Another abuse was the practice of the transfer companies employing soliciting forces to vie with each other to see which one of them would do the hauling for the carriers. The expense of that was applied in the cost of operations and ultimately borne by the carriers who employed the transfer companies as their agents. There were some cases where off-track stations were located across the street from on-track stations, where the haul would only be across the street from the off-track to the on-track station. The elimination of those duplications would have the effect of bringing about the savings that are reflected to some extent in the terms of this contract."

An example of the situation sought to be corrected by the one-transfer plan is found in the first report of the Commission following its investigation of conditions respecting the receipt and delivery and interchange of less-than-carload freight at St. Louis and East St. Louis, as follows (R. 92):

"The Missouri Pacific and Frisco have on-track stations located on the south side as well as the north side of St. Louis. Notwithstanding that fact they have for years paid allowances for the hauling of freight between off-track stations in St. Louis. An extreme illustration of this wasteful expenditure is afforded in the case of the off-track station of the Columbia at

Seventh and Cerre streets. This is an outbound station, purchased from the Fidelity Transfer Company, and located directly across the street from the Frisco outbound depot. So long as the allowance remains in effect it is possible for a shipper to dump outbound freight for movement over the Frisco at this off-track station, and for the handling of it across the street, very often accomplished by a truck-to-truck transfer without passage over the off-track station platform, the Frisco has been and is paying an allowance of $2 per net ton. The situation is only slightly less flagrant in respect of the Missouri Pacific on-track station, which is only 210 feet away from this outbound depot. It was situations such as these that finally brought the east-side and west-side lines, strongly competitive, to a realization that corrective measures must be applied to prevent gross waste of revenue. Under the proposed tariffs the Missouri Pacific and Frisco, with the exception hereinafter noted, will discontinue use of off-track stations both on the south side and north side of St. Louis, and will use their on-track facilities for the receipt and delivery of less-than-carload freight."

It is well at this point to refer to the contract assailed in the bill of complaint (R. 50). An analysis of this contract shows:

1. The railroads have selected off-track stations indicated in such contract.

2. The Columbia Terminal Company agrees to provide and maintain, at its sole cost and expense, to the satis-

faction of the railroads, adequate station facilities termed "off-track" freight stations for handling less-than-carload freight, and which shall be located in accordance with the selection by the rail carriers.

3. The rail carriers agree to designate the freight stations specified in sections Nos. 1 and 2 of this agreement as the only off-track freight stations of railroads in the City of St. Louis and City of East St. Louis, which off-track stations are, of course, the station facilities agreed to be maintained at its sole cost and expense by the Columbia Terminals Company.

4. The rail carriers agree to file necessary tariffs with the proper regulatory bodies designating the off-track stations in question.

5. The agreement also covers the transfer of less-than-carload freight in interchange between on-track stations of the carriers.

6. The amount to be paid to the Transfer Company is stated for its service in transporting less-than-carload freight between off-track and on-track stations and between on-track stations.

It will be observed that what the carriers seek to accomplish by the contract assailed in the bill of complaint and what they have accomplished by such contract is a substantial saving in costs of handling less-than-carload freight at St. Louis and East St. Louis, a proper location of off-track stations, and a more efficient handling of

the traffic involved through the selection by such rail carriers of one transfer company to do the work, and the carriers are as much within their lawful rights in establishing such off-track stations as such carriers would be in locating on-track stations on their rails or in the establishment and operation of a union station.

It will also be observed that the essence of the contract assailed is that the rail carriers shall designate certain off-track stations as freight stations of the railroads, shall deliver to one transfer company less-than-carload traffic handled in interchange, and that the arrangement shall continue for a period of one year, with the privilege thereafter of termination by either party upon six months' notice.

The case of Merchants Warehouse Company v. United States, 44 Fed. (2d) 379, declares the rule well settled that a railroad carrier may exercise its own discretion in the selection of its agents and employes to perform any part of its transportation service.

Inasmuch as the rail carriers maintain off-track stations at St. Louis and East St. Louis, such off-track stations are carrier facilities to the same extent as are the on-track stations of such carriers.

As stated by the Supreme Court in Merchants Warehouse Company v. United States, 283 U. S., l. c. 506:

> "We may assume that the railroads, in order to carry on their business as interstate carriers, are not

> bound to maintain their own freight stations, but may contract with others to supply them and to perform the transportation services which they are under a duty to perform."

If the carriers have such right, it is evident that such carriers may agree as to the number of stations maintained and who shall be their agent in connection therewith.

There is nothing in the arrangement covered by the contract, which petitioner alleges violates the Sherman Anti-trust Act, that might be called a combination not to employ the plaintiff or other transfer companies. As stated, the agreement, in substance, provides for the selection of certain off-track stations as the only off-track stations of the carriers, and also provides for only one agent to handle the traffic in connection with such off-track stations and selects one transfer company for the handling of its interchange business. There does not exist any agreement, however, to destroy the business of petitioner.

Having regard to the fact that the contract assailed in the bill of complaint provides for the selection of one transfer company to perform certain terminal services for the carriers party to such agreement the case of Terminal Warehouse Company of Baltimore City v. United States et al., 31 Fed. (2d) 951, is peculiarly in point. In that case, at page 956, the Court says:

> "It is also well settled that a carrier has full liberty to select its own agents to perform transporta-

tion service on its behalf, which it is under legal obligations to perform, and that it may employ one agent exclusively, and refuse to employ another (Covington Stockyards v. Keith, 139 U. S. 128, 11 S. Ct. 461, 35 L. Ed. 73; Express Cases, 117 U. S. 1, 6 S. Ct. 542, 628, 29 L. Ed. 791; Chicago etc. R. R. v. Pullman Southern Car Co., 139 U. S. 79, 11 S. Ct. 490, 35 L. Ed. 97; Donovan v. Pennsylvania Co., 199 U. S. 279, 26 S. Ct. 91, 50 L. Ed. 192)."

The case of Skaggs et al. v. Kansas City Terminal Railway Co. et al., 233 Fed. 827, is in point. The facts in that case are:

The carriers by railroad entering Kansas City formed the Kansas City Terminal Railway Company for the purpose of having such last-named company act as their joint agent and, among other things, in operating a union depot at that point. While operating such union depot for the trunk-line carriers serving Kansas City, Missouri, it entered into a contract with a certain transfer company, giving to such transfer company the exclusive privilege of soliciting patronage for its cabs, carriages and baggage service upon the grounds and premises of the Terminal Company at the Union Station operated by it. Such contract was attacked as unlawful as a conspiracy and agreement in restraint of trade and as creating a monopoly affecting interstate and intrastate commerce.

The particular point to which we call the attention of the Court in this case is that the Terminal Association at

Kansas City was owned by, was a creature of, was the agent of and operated for, the benefit of its owners, a facility at Kansas City, Missouri, and that any contract made by it giving exclusive privilege to one transfer company to enter upon its grounds to solicit patronage for cabs, carriages and baggage was in connection with transportation performed by the owners of the Terminal, the trunk lines entering Kansas City, and the effect of any such contract would be to give to one transfer company the exclusive right to solicit business on the grounds of the Terminal Company that came from the lines of the owning trunk-line companies.

In other words, looking to the substance rather than to the form of the contract in the Skaggs case, a situation was brought about wherein one transfer company had the exclusive right to enter upon the grounds of the Terminal Company and solicit patronage for its cabs and carriages arising from the operation of all the trunk lines entering such grounds.

The Terminal Company had no passengers and no baggage to be carried, but simply provided a facility used by the trunk lines, and the effect of the contract was in law an exclusive privilege granted by the trunk lines, through their agent, the Terminal, to one transfer company to enter upon the grounds of the Terminal and solicit business as aforesaid.

In these proceedings the contract between the transfer company involved and the trunk-line carriers was made

directly through the president of the Terminal Railroad Association of St. Louis. That is to say, the contract here assailed between the Columbia Terminals and the trunk-line carriers was entered into between the transfer company on the one hand, and the president of the Terminal Railroad Association on the other, acting for and on behalf of trunk lines.

In law there is no difference between the arrangement proposed at St. Louis and the arrangement upheld by the Court of Kansas City. In upholding the contract in the Skaggs case the Court said:

> "Furthermore, the rights of the public are not impaired by the grant by a railroad company of the exclusive privilege to solicit patronage for hacks and baggage transferring within its depot grounds, where the recipient of the privilege and the facilities furnished are subject to legislative regulation."

Another case in point is that of Donovan v. Pennsylvania Company, 199 U. S. 280. The facts in that case are as follows:

The Pennsylvania Company operated what was known as the Union Passenger Station in Chicago and had as its tenants the Chicago and Alton Railway Company, the Chicago, Burlington and Quincy Railway Company, the Chicago, Milwaukee and St. Paul Railway Company and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. All of such last-named companies occupied and

used the station under a lease by which the Pennsylvania Company had charge of the station, with authority to control and manage all trains therein, as well as all watchmen and employes in the business there transacted. The Pennsylvania Company instituted against the defendant Donovan and others, for the purpose of protecting that company in the enjoyment of certain alleged rights and privileges in respect of its passenger station and depot grounds in Chicago, and asked that defendants be perpetually enjoined from entering the station of the plaintiff for the purpose of soliciting the custom of incoming passengers for cabs, carriages, express wagons, hotels, etc.

Under the pleadings two principal inquiries arose: First, whether the Pennsylvania Company, having made an arrangement with the Parmalee Transfer Company to furnish at its passenger station all vehicles necessary for the accommodation of passengers arriving there on its trains and on the trains of other railroad companies, might legally exclude from its depot grounds all hackmen or expressmen coming to either for the purpose only of soliciting for themselves the custom or patronage of passengers; and, second, the rights of the Pennsylvania in connection with the use of the sidewalk in front of the station.

It will be observed, dealing with the first inquiry stated, that the traffic in question not only arose from the operation of Pennsylvania trains, but from trains of other railroad companies using the station.

Citing many cases not necessary to refer to here, the Court upheld the right of the Pennsylvania Company to confer upon one transfer company the exclusive use of its grounds to solicit patronage, not only in connection with Pennsylvania trains, but in connection with the trains of other railroads using the station facilities of the Pennsylvania.

An examination of the provisions of Sections 1 and 2 of the Sherman Antitrust Act shows that the principles declared by the courts in the Skaggs and Donovan cases, supra, are applicable to the arrangement of defendants and assailed in the bill of complaint. The essence of the illegality declared in said sections is restraint of trade and commerce. If there is no restraint of trade the contract or combination is not unlawful. The question, therefore, to be determined in any case is not how many are parties to a given contract or combination, but whether the effect of such contract or combination is to unreasonably restrain trade and commerce.

In the Skaggs case, supra, the parties actually making the arrangement were only the Kansas City Terminal Railway Company and the transfer company, the traffic affected by such arrangement was that handled by all the trunk-line railroads entering the Union Station maintained by the Terminal Railroad Company and the effect of such arrangement on trade and commerce necessarily was the same whether the contract was entered into between the Terminal and the transfer company or between the trans-

fer company and all of the trunk lines entering the Union Station, and the Court, in holding that there was no unlawful restraint of trade or commerce, sanctioned an agreement whereby the business of all the trunk lines entering the Union Station, in so far as such business was affected by the contract, for solicitation purposes was placed in the hands of one transfer company.

In the Donovan case, supra, while the arrangement in controversy was entered into only between the Pennsylvania, on the one hand, and the Parmelee Company, on the other, yet, since the Pennsylvania station was used by several other trunk lines entering Chicago, the effect of the arrangement was to give to the Parmalee Company the right to enter the station operated by the Pennsylvania and solicit the business, not only of the Pennsylvania, but of all the trunk lines using such station. The arrangement, therefore, brought about a situation whereby the Parmelee Company was given the exclusive right to enter the grounds of the Pennsylvania Company and solicit the business of all trunk lines entering the station to the exclusion of other transfer companies.

The similarity of the arrangement in the Donovan case, in so far as interstate traffic was concerned, with the arrangement assailed in this proceeding is obvious, and if in the case cited no unlawful restraint of trade or commerce resulted, certainly none would result here. The point we make is that the question of whether or not trade and commerce are restrained must be determined by the ar-

rangement in question rather than by whom the contract was entered into or by the number of carriers parties to such arrangement.

Other cases in which the courts have expressed views similar to those contained in the Donovan and Skaggs cases, supra, are cited under point IX, summary of the argument.

Petitioner seems to rely on United States v. Terminal Railroad Association, 224 U. S. 383, in which the United States filed a bill to enforce the provisions of the Sherman Act against the Terminal Railroad Association and thirty-seven other corporate and individual defendants as a combination in restraint of interstate commerce. The contention is made that these transfer companies, including the petitioner, performed by dray or truck service similar to that performed by the Terminal Railroad Association and involved in the case cited.

The error of petitioner is apparent and an analysis of the Terminal case shows that the conclusions therein arrived at are against the contentions of petitioner and support the arrangement assailed. The controlling findings of fact made by the Supreme Court in the Terminal Case, supra, are:

1. The Terminal Railroad Association was organized for the express purpose of acquiring the properties of several independent companies at St. Louis with a view to combining and operating them as a unitary system.

2. The properties first acquired and combined into one system by the Terminal Company comprised the Union Railway & Transit Company of St. Louis and East St. Louis, the Terminal Railroad of St. Louis and East St. Louis, the Union Depot Company of St. Louis, The St. Louis Bridge Company and the Tunnel Railroad of St. Louis. These properties included the great Union Station, the only existing railroad bridge—the Eads Bridge—and every connecting or terminal company by means of which that bridge could be used by railroads terminating on either side of the Mississippi River.

3. The promoters of the Terminal Company sought to obtain the control of every feasible means of railroad access to St. Louis, or means of connecting the lines of railway entering on opposite sides of the river, which was manifested by the successive steps which followed.

4. The first successive step was the control by the Terminal of the Merchants' Bridge Company and its related terminal companies.

5. The next step was the acquisition of the Wiggins Ferry Company, which owned terminals on both sides of the Mississippi River, and through such terminals connected with the rail lines at St. Louis and at East St. Louis.

The Court then states:

"We come, then, to the question upon which the

case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the Antitrust Act?"

The Court then finds that the unification of terminal facilities of a great city where many railroad systems center is not, under all circumstances and conditions, a combination in restraint of trade, and holds also that whether it is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the Act of Congress, as construed and applied in the case of The Standard Oil Company v. The United States, 221 U. S. 1, depends upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about, and the manner in which the control has been exerted, stating that:

> "The consequence to interstate commerce of this combination cannot be appreciated without a consideration of natural conditions greatly affecting the railroad situation at St. Louis."

The Court finds that though twenty-four lines of railway converge at St. Louis, none of them passes through; that about one-half of these lines have their termini on the Illinois side of the river, and that the others coming in

from the west and north have their termini either in St. Louis or on its northern edge.

It further finds that the cost of construction and maintenance of railroad bridges over the Mississippi River is so great as to make it impracticable for every road desiring to enter the city to have its own bridge, and that the obvious solution is the maintenance of toll bridges open to the use of any and all lines upon identical terms. That the first bridge—the Eads Bridge—was and is a toll bridge available to any carrier on equal terms; but to use it, there must be access over rails connecting the bridge and the railway, and this condition resulted in the organization of independent companies, which undertook to connect the bridge on each side with various railroad termini. Thus, while the bridge might be used by all upon equal terms, it was accessible only by the means of the several terminal companies operating lines connecting it with the railroad termini.

This brought about a condition which led to the construction of the second bridge—the Merchants' Bridge—also a toll bridge and subject to use by all on equal terms. This Merchants' Bridge, like the Eads Bridge, had no rail connections with any of the existing railroads, and these facilities, as in the case of the Eads Bridge, were supplied by a number of independent railway companies who undertook to fill in the gap between the bridge ends and the termini of railroads on both sides of the river.

Then the Court finds that these lines, connecting rail-

roads with the railroad bridges, dominated the situation and stood, as it were, just outside the gateway, and none could enter, even though the gate stood open, who did not comply with their terms.

The result was that, as a practical matter, it was impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company. This was true not only because of the facts before stated, but because of the geographical and topographical situation in and around St. Louis.

The trunk-line railroad companies, being the sole stockholders of the Terminal Company, compelled all other railroad companies converging at St. Louis to use the facilities owned and operated by the Terminal Company, and while previously there had existed the Wiggins Ferry Company and the Merchants' Bridge Company, as well as the Terminal Company, the result of the combination was to substitute the facilities of only one, and that the Terminal.

The Court then says:

> "The physical conditions which compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated."

It became, therefore, important in the minds of the Court to know the character and purpose of the corporation which had combined all of the terminal instrumentalities upon which the commerce of a great city and gateway between East and West must depend.

The Court then finds:

1. That the Terminal Company was organized in 1889, at the instance of six railroad companies, for the purpose of acquiring all existing terminal instrumentalities for the benefit of the combination, and such other companies as they might thereafter admit to joint ownership by unanimous consent.

2. That by another clause in the agreement the proprietary companies obligated themselves to forever use the facilities for all business destined to cross the river which would seem to guarantee against any competitive system, since the companies to the agreement then controlled about one-third of the railroad mileage of the United States.

3. That certain practices of the Terminal Company operated to the disadvantage of the commerce which must cross the river at St. Louis and of nonproprietary railroad lines compelled to use its facilities, one of which grew out of the fact that the Terminal Company was a terminal company, and something more; that it did not confine itself to supplying and operating mere facilities for the inter-

change of traffic between railroads and in assisting in the collection and distribution of traffic for the carrier companies.

4. That the Terminal, as well as several of the absorbed companies, were organized under ordinary railroad charters.

5. That the Terminal Company filed its rate sheets for the transportation of every class of merchandise from the termini of the railroad on the Illinois side of the river to destinations across the river over its lines.

6. That the Terminal Company adopted another practice that marked it as a transportation company which had interposed itself between railroads having their termini on both sides of the river, and between the city itself and the roads terminating on the east side of the river, which was that all traffic destined to cross the river at St. Louis, whether bound east or west, or destined for the city if coming from the east, was billed only to East St. Louis and there rebilled to destination.

7. That the effect of this practice of rebilling at East St. Louis and of imposing this arbitrary upon traffic originating within 100 miles of the city, destined to cross the river, applied to the large coal traffic from the Illinois coal mines, upon which the City of St. Louis is largely dependent.

Then the Court states:

> "But the illegal restraint upon commerce among the states which we here find to exist consists in the possession acquired by the proprietary companies, through the means and with the object we have stated, of dominating commerce among the states carried on by other railroads entering or seeking to enter the City of St. Louis, and by which such railroads are compelled either to desist from carrying on interstate commerce or to do so upon the terms imposed by the proprietary companies. This control and possession constitutes such a grip upon the commerce of St. Louis, and commerce which must cross the river there, whether coming from the east or west, as to be both an illegal restraint and an attempt to monopolize."

The foregoing analysis of some of the holdings in the Terminal case indicates clearly that the Court was of the opinion the combination assailed in that case was an unreasonable restraint of interstate commerce because, and only because of, the Terminal control of the entire gateway through St. Louis through the medium of tracks connecting with the bridges across the Mississippi River at that point, and because the Terminal had taken unto itself the functions of a railroad company rather than a terminal company. And added to these was the fact found by the Court that the topographical situation at St. Louis was such as to preclude the construction and maintenance of other tracks and bridges across the river to compete with the Terminal. These things gave the

Terminal a complete monopoly as a carrier by railroad of all the railroad traffic entering or passing through the St. Louis gateway.

There are no facts in the instant proceeding in anywise similar to those found by the Court to exists in the Terminal case. The Court, however, in that case made other findings which apply with peculiar force to the facts of this proceeding. For example:

1. The mere combining of several independent terminal systems into one may not operate as a restraint upon the interstate commerce which must use them.

2. The combination condemned would not have been an illegal restraint had it been what was claimed for it; a proper terminal association, acting as the impartial agent of every line which was under compulsion to use its instrumentalities.

3. That there is an essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business and are of the greatest public utility. They, under proper conditions, do not restrain, but promote, commerce.

In light of the fact that the contract assailed in this proceeding has to do with the receipt and delivery of

freight and in the interchange thereof, the views of the Court in the Terminal case just before set out are peculiarly appropriate and clearly distinguish what is involved in these proceedings from what was held to be an unreasonable restraint of trade and commerce in the Terminal case.

The Columbia Terminals Company is not only a mere terminal facility, but under the arrangement attacked is the impartial agent of the carriers to transfer carrier freight between off-track and on-track stations maintained by such carriers and in interchange. Such transfer company's only function is the collection and distribution of less-than-carload traffic within the St. Louis-East St. Louis terminals and the handling of that character of traffic between the on-track stations of the rail carriers. In no regard can it be said that such function in any sense restrains or impedes the movement of trade and commerce through the St. Louis gateway, and with less reason can it be said that because the appellant is not a coagent with the Columbia Terminals in collecting and distributing such traffic the Sherman Antitrust Act is violated.

The Interstate Commerce Commission, in its first report (R. 99), distinguished the combination condemned in the Terminal Company case, supra, from the facts here involved in the following language:

> "Counsel for the St. Louis Chamber of Commerce takes the position that the proposed contracts with the

Columbia will create a monopoly, in contravention of the Sherman Antitrust Act, 26 Stat. 209, c. 647. He relies upon United States v. St. Louis Terminal, 224 U. S. 383, in which the Supreme Court condemned the arrangements entered into between proprietary lines on the one hand and the Terminal on the other hand. He argues that these transfer companies are here performing by dray or truck precisely the same service that the Terminal performs by rail. Admitting these contentions, the case referred to is authority for the conclusion that the arrangement here proposed will not result in an unlawful restraint of interstate commerce. The commerce there found unlawfully restrained was in the entire traffic from, to and through St. Louis, rather than in the receipt or delivery of traffic at that point. The Court stated that if the Terminal Association were to be treated as a mere terminal facility the unification might be deemed promotive of the public interest. It was the grip which the association had upon the ingress and egress of commerce from beyond the terminal area over new and additional lines which made it unlawful. At page 410 the Court said:

"'Plainly, the combination which has occurred would not be an illegal restraint * * * if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities.'

"The Columbia is such an agent. Its services are those of a mere terminal facility. The arrangements proposed will not change in any manner the flow of commerce to, from or through St. Louis, either by the lines now serving it or by others which might later be

built, but will merely provide a different means of handling the receipt and delivery of existing traffic.

"There is nothing in the so-called one-transfer plan in and of itself which is unlawful. Nor can we conclude upon this record that service under this plan will be inadequate. Experience, alone, will answer that question, and if at any time the service becomes inadequate or is surrounded by practices which are unlawful, the shippers have recourse to us through the unusual channels of complaint."

That the views of the Commission are correct is evident from what the Supreme Court found in its second decision in the Terminal case (Terminal Railroad Association v. United States, 236 U. S. 194), in which the Court approved the decree entered in the District Court pursuant to the findings and mandate of the Supreme Court in its first decision (United States v. Terminal Railroad Association, 224 U. S. 383); but the decree as entered in the District Court was required to be modified

"so as to recognize the right of the Terminal Company, as an accessory to its strictly terminal business, to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same."

The substance of the decree, as modified, pursuant to the second decision, is quoted by the Supreme Court in its third decision (Terminal Railroad Association v. United

States, 266 U. S. 17), and, in so far as here material, is as follows:

"1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Antitrust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business, such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing and the like, and modifying its contracts as herein specified. An election having been made to continue the combination for terminal purposes, the defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered. Provided, however, that the right of said Terminal Railroad Association as an accessory to its strictly terminal business to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same, is

hereby recognized, and nothing in this decree shall be construed to deny such rights."

It will be observed from the foregoing that the vice inherent in the operation of the Terminal in the first instance was that it operated as a railroad transportation company, and that in the decree, as modified, it elected to confine itself to the transaction of a terminal business, such as supplying and operating facilities for the interchange of traffic between railroads and assisting in the collecting and distributing of traffic for the rail carriers. As such, the decree was approved and as a terminal facility the Terminal was not held not to be a combination in restraint of trade.

The services here involved consist, as stated, only in the collection and distribution of less-than-carload freight and supplying facilities for interchange of less-than-carload traffic within the St. Louis-East St. Louis district. Such service as is proposed to be rendered is not in violation of the Antitrust Laws under the decisions of the Supreme Court in the Terminal case.

The fact should be emphasized that, while petitioner insists that it is engaged in interstate commerce, it transports no freight for its own account. The rail carriers transport the commerce involved, and the petitioner is only employed by the rail carriers in such commerce. It is not asserted that the petitioner is entirely without the provisions of the Sherman Antitrust Act, but it is in-

sisted that it is not engaged in the transportation of interstate commerce under the Interstate Commerce Act, as is the Terminal Railroad Association, and that, since the commerce involved is transported by the rail carriers, petitioner is only a facility used by such railroads in transporting such commerce, the same as such carriers would use their own rails, box cars and engines.

In the Terminal case, supra, the Terminal was a railroad transportation company, filing tariffs with the Commission and engaging in the transportation of interstate commerce on its own account. Obviously, by reason of the fact that it controlled the bridges, in fact, the entire gateway—that is, the railroad gateway at St. Louis—and through such control the commerce of the country passing through such gateway, it is apparent that while the arrangement was condemned by the Supreme Court, no such situation exists, in so far as this controversy is concerned, and it requires a peculiar stretch of the imagination to contend that since the railroads use only the facilities of the Columbia Terminal Company, commerce is restrained, in view of the fact that the commerce in question is at all times railroad freight in possession of the railroads and being transported by the railroads through facilities either owned or contracted for by them.

Since the Columbia Terminal Company acts only as the agent of the carriers, or rather as a facility of the carriers, in terminal service handling less-than-carload freight being transported by such carriers and not on its own account,

by no process of reasoning can the situation created be likened to that passed upon by the Supreme Court in its decisions in the Terminal case.

It should not be overlooked that, as now construed, the Sherman Antitrust Act applies only to combinations in unreasonable restraint of trade (Standard Oil Company v. United States, 221 U. S. 1), and, in so far as this controversy is concerned, the only fact held up as constituting unreasonable restraint of trade is the fact that the carriers by rail do not employ the petitioner. It is not asserted that if petitioner were employed that any change would be brought about in the manner in which such traffic is being handled.

The case of United States v. Joint Traffic Association, 171 U. S. 505, holds with reference to contracts that the Antitrust Law applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that when the effect upon interstate commerce is indirect or incidental only, the Antitrust Statute does not apply.

That case also holds that an agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not covered by the antitrust laws, although the agreement may indirectly and remotely affect that commerce.

To the same effect is the holding of the Court in Phillips v. Iola Portland Cement Company, 125 Fed. 593.

The Duplex Printing Press case, Coronado Coal case, Bedford Stone case and other similar cases, cited and relied upon by petitioner in support of the proposition that the arrangement here assailed constitute a violation of the Sherman Act and an unlawful monopoly, have no analogy to the instant case, are clearly distinguishable and are not in any sense controlling. The authorities heretofore cited clearly establish the fact that the arrangement assailed violates none of the provisions of the anti-trust laws of the United States.

III.

**Other Rulings of the Court of Appeals.**

Petitioner, commencing at page 33, contends that certain holdings of the Court of Appeals were erroneous; for example, the conclusion of the Court that the execution of the contract was "the adoption by the carriers jointly of a method or practice of handling" this freight is criticized. It is contended that what the carriers adopted jointly was not a practice, but an illegal oral agreement to discharge petitioner. An examination of the contract discloses that the Court was correct. As stated by the Court, all that the carriers have done is to arrange jointly for the performance of a terminal service which does not differ substantially from that performed by the Terminal

Association with respect to carload freight. The point is made that page 35, Exhibit 10, is not a joint contract, but simply a device whereby one transfer company is employed by sixteen carriers under sixteen different contracts made by a combination, that the service of the Columbia is personal and confidential, each carrier paying its own bills with no obligation to or for its associates and having no interest in the service performed for them.

The contract in question provides for a sole transfer company to perform for each carrier certain terminal services, and the fact that there is no obligation on the part of one carrier to pay the Columbia for services performed for another carrier party to such an agreement is wholly beside the point. The further point is made at page 36 that the Court erred in stating (R. 170) that the investigation of the Commission was "to determine the lawfulness of the methods proposed by the carriers for reducing the number of off-track stations." Then the further point is made that the Court erred in saying that "the Commission reached the conclusion * * * that the proposals to reduce the number of off-track stations * * * would not be harmful to the public interest." Petitioner has overlooked the conclusion of the Commission (R. 120) as follows:

> "We have seen that there is nothing violative of the law in the proposal of the carriers to restrict the hauling for and on their behalf to a single transfer agency. * * * Likewise, this record is not convinc-

ing that unreasonable or inadequate service will result from, or that public interest will be adversely or unreasonably affected by the proposed limitation in the number of off-track stations to be operated for the respondents, particularly if the suggestions herein made in respect of direct delivery service are carried out."

IV.

**Disposition of the Case.**

Under the above heading petitioner says if the Court holds that it has the right to bring this suit it presumes this Court will then pass upon the merits of the case, but if it be held that petitioner has not the right to sue in equity, then petitioner requests that the decrees below be reversed, the pleadings ordered amended, and the case be transferred to the law side of the District Court under Equity Rule 22 and Section 397, Title 28, U. S. C. A. The cases of White v. Sparkill Realty Corporation, 280 U. S. 500, and Diamond Alkali Company v. Tomson & Co., 35 Fed. (2d) 117, are cited in support of the latter suggestion. Neither of said cases, however, is controlling here. The request that the case be transferred to the law side comes rather late and should not be considered by this Court in passing upon the petition for certiorari. Petitioner filed its bill in equity and sought only injunctive relief under Section 26, Title 15, U. S. C. A. (R. 168). The cause was tried before the District Court as

an equity suit and there was no suggestion or request by petitioner at any time while the case was pending in that court that it should be transferred to the law side. This is not the case of where what is really an action at law is erroneously begun as a suit in equity. This is unmistakably a suit in equity. Petitioner attempted to state a cause of action cognizable only in a court of equity, as shown by the allegations of the bill and by its prayer for relief. It was only interested in securing injunctive relief to prevent respondents from putting into effect the arrangement to reduce the number of their off-track stations in St. Louis. As petitioner prayed for a temporary restraining order, a preliminary injunction, and a perpetual injunction (R. 10) it doubtless would have strenuously resisted transfer of the cause to the law side by the District Court. Plaintiff prosecuted its appeal as from a decree in an equity cause and did not at any time suggest to the Court of Appeals that the case should be transferred to the law side in the event it was held that it could not maintain a suit in equity for injunctive relief. The proceedings on the appeal and in the Court of Appeals were throughout those customary in an equity cause. From petitioner's conduct of the appeal the Court of Appeals could have had no idea that petitioner desired the case transferred to the law side, and petitioner did not see fit to direct that Court's attention to the matter by a petition for rehearing.

As said by this Court in Twist et al. v. Prairie Oil & Gas Company, 274 U. S. 684:

> "In federal courts, as in others, a plaintiff has a right to choose whether he will seek to enforce a legal or an equitable cause of action and whether he will seek legal or equitable relief. He makes his election and proceeds at law or in equity at his peril."

In the case just cited this Court reversed the Circuit Court of Appeals for this (8th) circuit for treating the appeal as one at law and affirming the judgment on the pleadings, and remanded the case to it with instructions to decide the appeal as one in equity.

In Liberty Oil Company v. Condon National Bank et al., 260 U. S. 235, this Court also reversed the Circuit Court of Appeals for this (Eighth) circuit for treating the appeal in that case as one in an action at law and reversed and remanded the case to that court for consideration and decision of the issues of fact and law as on an appeal in equity. In view of these two cases, the Court of Appeals, in the instant case, was fully justified in deciding the appeal as one in equity.

In Perego v. Dodge, 163 U. S. 160, it was held that plaintiff, having voluntarily invoked the equity jurisdiction of the court, he was in no position to urge, on appeal, that his complaint should have been dismissed on account of adequacy of remedy at law. This case is cited in Twist et

al. v. Prairie Oil & Gas Company, supra. Plaintiff in the case at bar is in the same position. Petitioner should not be allowed to blow hot and cold with the Court.

The request for transfer of the case to the law side is a mere afterthought. Moreover, transfer of the case to the law side would be a useless gesture, as petitioner, under the decision of this Court, in Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, cannot maintain an action in damages against respondents for alleged violation of the Antitrust Laws any more than it can maintain this action for injunctive relief.

Where the question whether a suit should be on the law or equity side of the court is not important for the purpose of the decision because the same result must be reached in either event, the cause will not be transferred from the side on which it is brought to the other side of the Court (Palmer v. Doull Miller Co., 233 Federal 309; Shapiro v. Lyle, 30 Federal [2d] 971).

**Conclusion.**

It is therefore respectfully submitted that the conclusion of the Court of Appeals to the effect that the suit brought by petitioner against these carriers, respondents, is in respect of a matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission, and that petitioner had not the right to bring it, is correct; that the holding of the District Court to the

effect that the contract assailed in the bill of complaint was not in violation of the Antitrust Laws of the United States was correct, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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